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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 720

ARTHUR A. PEISNER, *Petitioner*

v.

STATE OF MARYLAND, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Arthur A. Peisner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered on July 27, 1964, "Judgment Affirmed, with costs."

OPINIONS BELOW

On September 12, 1963, the Circuit Court for Montgomery County, Maryland, entered a judgment of conviction, after a jury trial. This judgment was affirmed by the Maryland Court of Appeals on July 27, 1964, 202 A. 2d 585, and this Appellate judgment is printed in Appendix A, hereto.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on July 27, 1964. The jurisdiction of this Court is invoked under 28 USCA 1257 (3).

QUESTIONS PRESENTED

(1) Was there a denial of the Petitioner's right to a fair trial under the due process clause of the 14th Amendment to the Federal Constitution, by the failure of the trial court to exclude a great mass of improper evidence and comment?

(2) Was there a denial of the Petitioner's right to a fair trial under the due process clause of the 14th Amendment to the Federal Constitution by the failure of the trial court to declare a mistrial because of the highly inflammatory and prejudicial remarks of the State's Attorney before the jury, and because of the overwhelming accumulation of inadmissible evidence admitted during the presentation of the State's case?

(3) Was there a denial of the Petitioner's right to a fair trial under the due process clause of the 14th Amendment to the Federal Constitution by the admission in evidence, whether objected to or not, of an overwhelming mass of evidence clearly violative of the rules of evidence?

STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States and Article 23, Maryland Declaration of Rights. They are printed in Appendices B and C, respectively.

STATEMENT OF THE CASE

Petitioner was convicted on six counts of a six count indictment charging him with conspiracy to defraud the depositors of the Mutual Security Savings and Loan Association, and conspiracy to defraud the Mutual Security Sav-

ings and Loan Association. There was a jury trial had in the Circuit Court for Montgomery County, Maryland at which the Petitioner was not represented by counsel, although an attorney himself, and a judgment of conviction was entered on September 12, 1963.

The State presented as a witness in its behalf Robert Harold Symonds, an alleged co-conspirator who had previously pleaded guilty to one count of the same indictment. Despite repeated denials by its own witness, Symonds, the State and the Court continually attempted to get said witness to admit to an agreement among the alleged conspirators to illegally take money. (E36, 37, 38, 39) Nevertheless, this witness, who was to say the least not hostile to the State, repeatedly denied the existence of such an agreement or understanding. (E36, 37, 38, 39) Despite this, the Court earlier permitted Charles A. Docter, an important witness for the State, to testify that, in connection with his duties as Trustee in Bankruptcy of Mutual Security Saving and Loan Association, and long after the alleged November 24th, 1961 end of the conspiracy, Symonds had stated to him that there had been an agreement between himself and the defendant to take as much money as they wanted. (E21, 22) In the face of continuous objection to this line of questioning, the Court permitted it on the ground that statements of a co-conspirator are admissible against a fellow conspirator. (E21, 22)

The same witness, Docter, was permitted to testify specifically about checks issued by one of the corporations involved, in payment for a fur coat for defendant Peisner's wife, and checks issued directly to defendant's wife and daughters. (E22, 23) This evidence was received although, upon objection, it was shown that the witness did not have the checks with him, and that he had left them in Baltimore with the records of the Bankruptcy proceeding. (E23, 34)

Again, the same witness, Docter, who at the repeated requests of the defendant had to be instructed by the Court to confine his answers to the questions, testified over objection as to the appraised value of the defendant's house, when he himself was not a qualified appraiser. (E24)

For the same purpose, this witness was again allowed to offer into evidence a contract pertaining to said house, and a deed of trust in connection therewith, neither of which was authenticated in any way prior to introduction. (E25, 26, 27, 32)

Despite unanimous agreement by *all* of the State's witnesses that Defendant Peisner had parted company with the Savings and Loan Association and related corporations in July or August of 1961, the witness Docter was permitted to testify that a large batch of "phony" deeds of trust were recorded by these organizations in November of 1961. (E5, 6, 7, 30, 31, 32, 39)

Again, relating to the same matter, over objection, Mr. Docter testified about certain "phony" or blank appraisals in connection with the properties which were the subjects of the aforementioned deeds of trust, and added some hearsay statements allegedly made by the individual who prepared or signed the appraisals. (E29, 30)

During the course of the State's direct examination of witness Docter, in connection with an objection made by the defendant, there ensued a conversation between the Court, the State's Attorney, and the defendant, in front of the jury, in the course of which the State's Attorney referred aloud to the defendant as a "liar", and as a man who has "millions". (E25, 26)

The following prejudicial testimony and evidence, not objected to, was admitted into evidence by the Court:

Paul M. Coughlan, court appointed receiver, testified as to the previously mentioned valueless deeds of trust recorded in November, 1961, as to certain checks paid by the

corporations involved, in connection with the personal residence of the defendant, without having the checks in court, and that certain activities of Mutual Security Savings and Loan Association violated Department of Defense restrictions on allotment checks (pure hearsay as for as he was concerned. (E7, 8, 9)

Fenton L. Martin, receiver in Bankruptcy of Mutual Security Savings and Loan Association, testified at length about the previously mentioned deeds of trust recorded in November of 1961. (E12, 13)

The Court permitted considerable testimony to be admitted tending to prove that the defendant had converted to his own use on November 24, 1961 the proceeds of the sale of an airplane allegedly belonging to Wayne Invsetment Corporation, one of the corporations related to the savings and loan association. (E11)

The Court admitted testimony tending to show that the defendant used credit cards of Mutual Security Savings and Loan Association or related corporations for purchase of gasoline subsequent to July of 1961. (E29)

Albert W. Thompson, accountant for the receiver, was permitted to offer hearsay testimony as to an attempt allegedly made by the businesses involved to prepare books and records, was blatantly led into testifying as to the amount of money paid by the Savings and Loan Association to the related corporations, was allowed to give hearsay testimony as to what Robert H. Symonds had said to him, and was allowed to testify as to checks written to the defendant without offering the checks in court. (E14, 15, 16)

Charles A. Docter, appointed trustee long after the alleged end of the conspiracy, gave further hearsay testimony as to conversations with and statements by Robert H. Symonds, as to conversations with and statements by Morton Lifshutz, as to certain documents without pro-

ducing the documents, as to certain checks issued to or for the defendant without producing the checks, and as to certain letters without authenticating them. E 18, 19, 20, 21, 22)

Edward L. Meyer, a State's witness, was permitted to give damaging hearsay testimony as to an alleged conversation between himself and Symonds, an alleged co-conspirator, after the alleged termination of the conspiracy. (E13)

REASONS FOR GRANTING WRIT

1. The central question in this petition is whether the failure of the trial court to exclude a great mass of improper evidence and comment amount to a denial of petitioner's rights under the due process clause of the 14th Amendment to the Federal Constitution, and Article 23 of the Declaration of Rights of the Maryland Constitution.

The Trial Court allowed the State to introduce pure hearsay testimony of statements made by Robert Harold Symonds to witness Charles Docter (E21, 22), overruling the objection of petitioner on the ground that conversations on the part of a conspirator are admissible against any other co-conspirator, an except to the hearsay rule. (E21, 22) But, in all cases and at all times, only those declarations made by a co-conspirator during the course of a conspiracy and in furtherance of the conspiracy can be used against his fellow conspirator. *Greenwald* v. *State*, (1960) 221 Md. 245, 157 A2d 119; *Lutwak* v. *U. S.* (1963), 344 U.S. 604, 73 S.Ct. 481.

Mr. Docter's testimony was that Mr. Symonds made the statements in question while he was testifying before the Referee in Bankruptcy in Baltimore in late July of 1963. (E18, 22) By the State's own indictment, the *latest* that the conspiracy could have existed was November 24, 1961. (E1, 2, 3, 4) By the State's own witness, it was shown that in all prabability any conspiracy that had ex-

isted ended as far as the defendant was concerned in about July of 1961 (E5, 6, 7, 39)

The same witness, Docter, was permitted, over objection, to tell the jury that a $2,652.31 check was issued by Wayne Investment Corporation for a fur coat for defendant's wife, *without* producing the best evidence thereof, that is, the check itself, which he stated was in the bankruptcy file in Baltimore. (E22, 23, 34) The witness apparently brought with him *some* of the documents from the bankruptcy case file, and offered no explanation or testimony why he did not or could not bring with him this check about which he testified in detail. Admission of Docter's testimony relative to the check for the fur coat was a clear violation of the best evidence rule. *Corens* v. *State* (1946), 45 A2d 340, 185 Md. 561.

Along the same line, and constituting the same type of violation, was Docter's testimony about checks payable "to him (Peisner), to his wife, to his daughters, to anyone in his family" without producing such checks in Court. (E23, 34) The Court apparently was aware of the violation, but admitted the testimony upon the State's promise to later produce the checks. (E23, 24) They were, in fact, never produced, and Mr. Docter later admitted they were in Baltimore. (E34)

Docter, not a qualified real estate appraiser, volunteered testimony (over objection) as to the value of a house allegedly built for defendant by one of the corporations related to Mutual Security. (E24) After the damage had been done, and the Court ruled that this testimony should be stricken, the witness continued, despite objection, to testify to what an appraiser had appraised the house at, clear hearsay. (E24) The Court apparently permitted this testimony merely because the appraisal was filed in the bankruptcy proceeding in the Federal Court in Baltimore, and even admitted the written appraisal into evidence after much testimony concerning its

contents in the hearing of the jury, another violation of the hearsay rule, *Heil* v. *Zahn* (1947), 51 A2nd 174, 187 Md. 603. (E24)

During the testimony of Docter, and over objection, the Court admitted into evidence a contract for the purchase of defendant's house, with absolutely no authentication by the parties who executed it. (E26, 27) In fact, the defendant's objection was premised specifically on a denial that he had signed the contract. (E26) In a similar manner, the Court admitted a deed of trust on the same property, over objection. Neither of these documents was authenticated in any way and they were inadmissible, *Haney* v. *Marshall* (1856), 9 Md. 194. (E32)

In connection with the transfer of the same property from Lifshutz to the defendant, Docter was permitted to testify that no consideration had passed between the defendant and Lifshutz, clearly a fact he could not have personal knowledge of. (E33) Although the Court ultimately sustained the objection, it was not until after further improper testimony was inserted, including some by the Court.

A flagrant violation was committed by the State's Attorney during the testimony of Docter when, in the hearing of the jury, and while discussing the defendant's objection to the admission of the sales contract hereinbefore mentioned, Mr. Burka said (E25, 26) "Your Honor, I object to the lies that this man is mouthing. I hardly want to speak to him, much less talk to him," and then, referring to defendant's financial ability to hire a handwriting expert, 'That is correct; if he wants to pay him he can have him. He's got millions. He can pay for these things." Even though defendant objected, the damage was done. The Court made no effort to caution the jury to disregard these remarks, nor to censure the State's Attorney.

The same thing was done by the State's Attorney during re-direct examination of Docter when he said, "You stated

that Mr. Peisner has been a great help in recovering assets of the bankrupt corporation. Is that because he knows where more is hidden than anyone else?" (E35)

Throughout the trial, and ocean of testimony was admitted concerning a total of $1,339,300 of "fictitious" deeds of trust owned by Mutual Security Savings and Loan Association, and, in fact, the deeds themselves were admitted in evidence as Exhibits 59, 88 and others. (E31, 32, 7, 8, 12, 13) An objection was made to these exhibits on the grounds of their relevancy to the defendant. (E27) The State, by the comment of the State's Attorney, and by the testimony of its own witnesses Docter, and Coughlan, established that these deeds of trust were recorded in November of 1961, and were prepared just before they were recorded. (E27, 31, 7) Cross-examination of the State's witness, Symonds, revealed that, if in fact these deeds might have been prepared considerably before November 1961, they were only prepared in blank, unexecuted, with no fictitious amounts filled in, and that these fictitious amounts were filled in and the deeds executed and recorded upon the instruction of Mr. Swirnow in November 1961. (E40, 41, 42) Despite repeated testimony by the State's witnesses that the defendant left the Mutual Security Saving and Loan Association in about July or August of 1961, (E5, 6, 7, 30, 31, 32, 39) and that he left when Swirnow entered the picture, the Court admitted these fictitious deeds of trust in evidence against the defendant, stating that whether or not defendant was connected with the Corporations at the time would go to the weight of the evidence. Even worse, during cross-examination of the State's witness Docter, the Court itself posed questions to the witness relative to these same deeds of trust that elicited the witness' response that they "are the most fictitious and phony trusts that I have ever seen. There is nothing to them. They were just simply made, as Mr. Burka has said, to try to fool the Attonrey General", and further, "I think they put them on record quite clearly in order to cover the fact

the money was all gone; create these phony assets." (E34, 35) All of this was admitted, even though the State was at the same time relying on the defendant's severance of relationship with the corporations sometime in July to show the illegality of certain expenditures he charged to corporation credit cards thereafter. (E29)

Almost as serious, and over objection, the court permitted Docter to give hearsay testimony as to what a Mr. Isard said about certain property appraisals Docter found in the files, and which Docter characterized as "phony". (E29, 30) Even though the Court finally sustained the objection, he had already permitted the damage to be done. Of particular significance in pointing up this error is the fact that the State's witness Symonds established that the false appraisals referred to were made *after* the defendant had left the organization. (E42, 43)

The damaging effect of the aforementioned errors, each of which was objected to, is self evident. In a conspiracy trial, what could be more damaging than to establish (through inadmissible evidence) that there was in fact an actual agreement to take (by implication, to steal) whatever money was available at the moment.

Inadmissible evidence of corporate expenditures for defendant's personal uses would certainly be prejudicial to him where he was charged with conspiracy to defraud the corporation and its shareholders.

The inadmisssible documentary and hearsay evidence bearing on the value of defendant's house (sales contract, deed of trust, appraised value) was clearly damaging in that it tended to establish that the corporations built him a house costing about $50,000, when all he could show by way of payment was a $30,000 first mortgage loan.

Perhaps most damaging of all, because of the sheer dollar volume referred to ($3,000,000 by one witness, $1,339,300 by another) (E7, 31) was the repeated wrongful reference to the "phony" deeds of trust recorded

in November 1961, which all of the State's own testimony showed was after defendant's departure, and which was wholly irrelevant as to any alleged conspiracy he may have participated in at an earlier time. Because of the large amount of money, and the repeated testimony by innumerable witnesses, this evidence was such as to *necessarily* bias the jury and prejudice the defendant. Of the same nature was the wrongful association of the defendant with the "phony appraisals" related to these deeds of trust.

These violations were particularly flagrant in that they appear to be deliberate on the part of the State, for most of the evidence showing that defendant was not connected with the recording of the "phony" trusts or the creation of supporting "phony appraisals" came from the State's own witnesses throughout the trial, and could not have surprised the State.

It is well nigh impossible to imagine remarks by a prosecutor, during the course of a trial for conspiracy to defraud, more prejudicial and damaging than these of Mr. Burka when he referred to the defendant, in the hearing of the jury, as a "liar", and a man who has "millions". Could a jury possibly disregard this and wipe its collective mind clean, if so instructed? Here, it was not even so instructed. Nevertheless, the prosecutor felt that another similar nail in the defendant's coffin was in order, and drove it by his leading question which in effect *stated* that defendant knew more than anyone else about where the assest of the corporations were hidden.

These prejudicial remarks *alone* should have been grounds for a mistrial. Defendant did in fact move for a mistrial before the State had completed its case, on the ground of the continuous admission of hearsay testimony and the prejudcial nature of Docter's testimony. (E44) The motion was denied. (E44) It is submitted that the mass of inadmissible evidence already in the case at this point, plus the inflammatory conduct of the State's Attorney (although not specifically referred to

by defendant as a ground for mistrial) made it incumbent upon the trial Court to grant defendant's motion for a mistrial.

This Honorable Court's attention is next directed to an equally voluminous mass of error committed below, *without objection* by the defendant.

The general rule that a Court of Appeals will not review questions not tried or decided below stems from the obvious unfairness of permitting trial counsel to correct on appeal what may have been an erroneous or unwise trial tactic, or a bad guess, in failing to object to matters at trial, *Hall* v. *State,* 213 Md. 369, 131 A2nd 710. It is submitted that the reason for this rule diminishes when defendant in a criminal trial is not represented by Counsel. Nor does it make an appreciable difference that the defendant is in fact a member of the bar himself (albeit not an active practitioner), for it is only too obvious that it would take a man of extraordinary caliber indeed to coolly and objectively defend himself under the pressure of a serious criminal charge. Under such circumstances, even more than ordinarily, the trial judge should not be mere passive moderator, but should use a firm hand to ensure a fair trial. In the case at bar, even if the hereinafter mentioned errors, not objected to below, cannot, each by itself, stand as a ground for reversal, it is nevertheless apparent that error in this trial, both objected to and not objected to, reached such a degree of frequency as to become necessarily prejudicial by its sheer cumulative weight.

Early in the trial, Paul M. Coughlan, court appointed receiver for Mutual Security Saving and Loan Association, testified, without objection, about the valueless deeds of trust that were the subject of testimony by so many witnesses, throughout the trial, although not connected with defendant Peisner. (E8) Shortly thereafter, Fenton L. Martin, the receiver in bankruptcy, was permitted to testify about exactly the same thing, with the Court participating in the questioning. (E12, 13) It is not nec-

essary to again call this Honorable Court's attention to the probable effect of repeated testimony about a tremendous dollar value of "phony" mortgages.

Certainly depositor Meyer's testimony that con-conspirator Symonds had talked to him (after the termination of the conspiracy) but had stated he would lie about having done so would necessarily reflect discredit on whomever it was used against (the defendant in this case).

Of less serious nature, but nevertheless individual items that are part of the great mass of error below, was Mr. Coughlan's hearsay opinion as to the Department of Defense restrictions that had been violated by Mutual Security Saving and Loan Association, his testimony about certain checks issued for the construction of defendant's house without producing the checks, and a multitude of leading and hearsay questions asked him and answer by him. (E7, 8, 9, 10)

In the same category are the errors in Albert W. Thompson's testimony set forth hereinabove under statement of fact, plus several additional leading and hearsay questions asked of and answered by him during his testimony. (E14, 15)

The testimony admitted relative to the sale of Wayne Investment Corp's airplane was exceedingly damaging because of the substantial sum of money involved, and should *clearly not* have been admitted. Every one of the State's witnesses who testified as to the matter (Symonds Swirnow) stated that the airplane was *not* given to the defendant, but was a corporate asset. (E35, 37) If in fact it was converted by defendant, it was clearly his *own* act, and not part of the alleged conspiracy. Supporting this, of course, is the fact that it was done *after* the time the State's witnesses indicated that defendant has left the savings and loan company and related organizations. (E11) If the keeping of the airplane proceeds by defendant was wrongful, evidence thereof was not admissible in a trial for *conspiracy* to defraud.

In the same manner, the Court permitted Mr. Docter to testify as to certain uses of the corporate gasoline credit card by defendant, *after* he was no longer associated with the corporation. This likewise, if wrong, was not part of a *conspiracy,* and should not have been admitted in this trial.

Finally, the errors (not objected to) in the testimony of Charles A. Docter, as set forth in the Statement of Fact, combined with those errors in his testimony to which objection *was* made, add up to an accumulation that leaves relatively little of his testimony that was relevant and admissible.

It is true that a great many of the errors just mentioned hereinabove were not, in and of themselves, very prejudicial. It is also true that a defendant is not entitled to a *perfect* trial. Nevertheless, it is equally true that many trivial errors can amount to such a mass as to have a harmful cumulative effect, and it is submitted that such was the volume of error immediately hereinabove set forth. This volume of error, when added to those errors that *were* properly objected to and that *were* clearly prejudicial, amounts to an unfairness that demanded reversal of the verdict in the lower Court, and, in fact, approaches the grossness that amount to a violation of the defendant's due process rights under the 14th Amendment to the United States Constitution and Article 23 of the Declaration of Rights of the Maryland Constitution, *Roberts* v. *N. Y.* (1935), 295 U.S. 264, 55 Supreme Ct. 689, 12 Am. Jur. 273.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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